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IN THE

Supreme Court of the United States

ARNOLD M. PRESTON,
Petitioner

v.

ALEX E. FERRER,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

BRIEF OF SCREEN ACTORS GUILD, INC. AND AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS, AFL-CIO AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amici are labor unions representing artists in the motion picture, television, commercial and new media industries.

Amicus Screen Actors Guild, Inc. ("SAG") is the nation's largest labor union representing working actors. Established in 1933, SAG represents more than 120,000 working actors and other performers in film, television, industrials, commercials, music videos, and new media. SAG exists to protect and enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.

Amicus American Federation of Television and Radio Artists, AFL-CIO ("AFTRA") is a national labor organization with a membership of over 80,000 professional artists, including but not limited to, actors, broadcasters and recording artists who work in the television, radio and sound recording industries nationwide.

Amici have collective bargaining agreements with all of the major motion picture and television production companies, television networks, and/or

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters evidencing the parties' consent to the filing of this brief are on file with the Court and copies are attached hereto.

commercial producers. These collective bargaining agreements govern the wages, hours, and working conditions of *Amici*'s members.

Through their internal regulations and, as applicable, through agreements with non-profit trade associations, such as the Association of Talent Agents ("ATA") and National Association of Talent Representatives ("NATR"), *Amici* extensively regulate the relationships between their members and the talent agents who represent them and require that talent agents who represent their members be bound by a comprehensive set of regulations referred to as a franchise.[2] Other entertainment unions, including Directors Guild of America ("DGA"), and Writers Guild of America ("WGA"),[3] similarly regulate their members' relationships with their agents. The Unions' franchises establish standards of conduct for talent agents and require them to comply with certain conditions and limitations which augment and supplement provisions in the California Talent Agencies Act, including, but not limited to, the establishment of separate client trust accounts, posting of surety bonds, and limits on commission rates. The franchises also create standard form contracts for talent representation and place restrictions on talent agents' economic interests in production activities. As allowed under the arbitration language in the TAA, the franchises

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2 *See infra.*

3 SAG, AFTRA, DGA, and WGA are referred to collectively herein as the "Unions".

require that disputes between agents and their clients be arbitrated.

The consistent enforcement of the TAA against those who encroach on its jurisdiction is essential to protecting those who are the most vulnerable to abuse by those who seek to profit from them. As the effective enforcement of the TAA is critical to the Unions' agency franchise systems and to the protection of their members, the *Amici* and their members have a fundamental interest in ensuring these protections are not eroded.

SUMMARY OF ARGUMENT

The entertainment industry has a unique culture that attracts diverse participants with varying motives. Some are attracted by the opportunity for artistic expression, others by business and profit motives. And still others seek to manipulate both the system and those most vulnerable within it to reap personal gain. This vulnerability combined with the unique mechanisms by which artists gain employment, as well as the very brief duration common to most industry jobs for artists, gives those who control the procurement of artists' employment immense power. For these reasons, and in light of recurring abuses at the expense of artists, the California Legislature has long recognized the need to regulate those who procure employment for artists.

For nearly a century, California has regulated the act of procuring employment on behalf of artists. The current incarnation of that regulation is the Talent Agencies Act, CAL. LAB. CODE § 1700, *et. seq.* (hereafter "TAA" or the "Act"), a comprehensive regulatory and licensing scheme which mandates that anyone who procures employment on behalf of an artist be licensed. For nearly three quarters of a century, the Labor Commissioner has been empowered to create rules and regulations under the Act and its predecessor laws and has had original jurisdiction to hear controversies arising under it, subject to *de novo* review.

In the instant matter, Petitioner, Arnold Preston, challenges the Labor Commissioner's

jurisdiction to hear a claim arising out of his personal management contract with Alex Ferrer. Petitioner basis his challenge on an arbitration provision included in the management contract, a provision that incorporated California law, contending that the Federal Arbitration Act (hereafter, "FAA"), 9 U.S.C. §1, *et. seq.*, mandates arbitration and divests the Labor Commissioner of her statutory authority. Although the contract between the parties was for management services, Respondent alleged that Petitioner had acted as an unlicensed talent agent by attempting to procure employment on his behalf. When a dispute arose between the parties, the Petitioner initiated arbitration proceedings and the Respondent, as mandated by the TAA, sought the Labor Commissioner's review. The Labor Commissioner found there was a colorable basis for the exercise of her jurisdiction under the TAA and agreed to hear the dispute. Believing the Labor Commissioner's opinion could be informative, the arbitrator stayed the arbitration pending the Labor Commissioner's determination.

The TAA is a remedial statute crafted by the California Legislature in an exercise of the state's police power. It is critical to protecting vulnerable individuals in an environment where aspirants will do almost anything to "make it big." The TAA is carefully balanced to protect the interest of both the artists it protects and the agents it regulates. The consistent enforcement of the TAA is critical to maintain this careful balance, as the court below recognized.

Nothing in the TAA conflicts with the FAA, as the Petitioner claims. There is no state statute that acts as a complete bar to arbitration. At best, the TAA delays arbitration while the Labor Commissioner completes her inquiry through a cost-effective administrative hearing process that is subject to *de novo* review. Nothing prevents the parties from seeking that *de novo* review before an arbitrator, rather than through the courts. Further, as the arbitrator in this matter recognized when he stayed the proceedings, the Labor Commissioner's expertise may provide valuable guidance to the arbitrator.

Petitioner seeks to divest the Commissioner of her jurisdiction to hear a large class of controversies arising under the TAA based on a private agreement between the parties. Such a divestment of the Labor Commissioner's jurisdiction potentially opens a loophole that could be devastating to the enforcement of the TAA against unlicensed individuals. If Petitioner's approach is adopted, an individual could simply insert an arbitration provision in a contract and then blatantly flout the TAA's licensing requirements with confidence that the Labor Commissioner lacks jurisdiction to hear any disputes under that contract. Such an approach would also divest the Labor Commissioner of her most important tool in effectively administering her responsibility to enforce the TAA.

The *Amici* therefore urges this Court to affirm the decision below.

ARGUMENT

I. The Talent Agencies Act is an Exercise of California's Police Power to Regulate in a Creative Industry Where Individuals are Vulnerable to Abuse

Artists in the entertainment industry typically rely on a small army of people to help support their careers – an army that grows in size as the artist's career grows. Agents find job opportunities and assist them in securing employment and negotiating its terms; personal managers counsel and guide their careers, often advising them which job opportunities to pursue or which agent to engage; business managers assist with the artists' financial management; attorneys provide legal services; publicists promote the artist and guide him in his dealings with the media; and the Unions provide protections in the form of minimum standards for wages and working conditions. Each of these support functions, as well as many others, plays a particular role in an artist's career. Some of the role differentiation arises from the individuals' skills; others are the result of regulatory schemes designed to protect the artist.

The unique nature of the entertainment industry gives those who guide artists' careers and those who control the procurement of employment immense power over artists. Few artists are in a position to scrutinize or challenge these trusted advisors. And even fewer have sufficient expertise or clout to effectively negotiate the terms of their representation, especially when faced with the take-

it-or-leave it choice of accepting representation under unfavorable terms or having no representation at all. For these reasons, and in light of recurring abuses at the expense of artists, the California Legislature has long recognized the need for regulation of those who hold the keys to artists' careers.

Recognizing the power dynamic between artists and those who hold the keys to their employment, the state, exercising its police power to protect artists, determined that one must be regulated to hold those keys. One of the primary, and empirically most effective, enforcement mechanisms to ensure compliance with the TAA has been administrative adjudication before the California Labor Commissioner, who is tasked with such enforcement. When an unlicensed individual has procured employment in violation of the TAA, a regulatory statute prohibiting such conduct, the Labor Commissioner has discretion to declare the resulting contract void.[4] The possibility of losing all commissions is a tremendous disincentive to violating the Act.

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[4] For decades, and with only few exceptions, the Labor Commissioner and the California courts have held that when an unlicensed individual violates the TAA, the resulting contract is void, *ab initio*. The California Supreme Court is currently weighing the issue of whether the contract is always to be void *ab initio* or whether it is appropriate to sever commissions earned for the unlawful conduct from those earned for lawful conduct under the parties' agreement. *See, Marathon Entertainment v. Blasi*, 140 Cal. App. 4th 1001, *review granted*, 143 P.3d 656; 49 Cal. Rptr. 3d 656.

A. The Talent Agencies Act is a Remedial Law Intended to Protect Artists from Those Who Hold the Keys to Their Careers and Could Take Advantage of Them

The TAA is a carefully crafted statute that balances the interests of artists and those who represent them. The Act provides a detailed regulatory and licensing scheme and includes various protections against misconduct by licensed agents. The Labor Commissioner is charged with enforcing the TAA and adjudicating claims arising from alleged violations of it, whether by licensed or unlicensed individuals.

The Act strictly regulates procurement of entertainment-related employment to ensure the welfare of artists. *Waisbren v. Peppercorn Productions, Inc.* 41 Cal. App. 4th 246 (1995). It is a remedial law, within the police power of the state, designed to correct abuses and enacted for the protection of artists. *Buchwald v. Superior Court,* 254 Cal. App. 2d 347, 350-351 (1967). *See, also, Styne v. Stevens,* 26 Cal. 4th 42 (2001).

1. History of the Talent Agencies Act

The act of procuring employment for artists has been regulated for nearly a century and the Labor Commissioner has had original jurisdiction to hear disputes arising from such conduct for nearly as long. The Private Employment Agencies Law (hereafter "PEAL"), enacted in 1913, included regulations covering "theatrical employment agencies," which, at the time, operated within the context of "circuses, vaudeville, theatrical and other

entertainers, exhibitors, and performers." *Buchwald v Katz*, 8 Cal. 3d 493 (1972); CAL. DEP'T OF INDUS. RELATIONS, CAL. ENTERTAINMENT COMM'N REP. (1985) at 6 (citing 1913 Cal. Stat. 282). In 1923, the PEAL was amended to empower the Labor Commissioner to make rules and regulations and to give the Labor Commissioner original jurisdiction to hear and determine all controversies arising under it. *Buchwald*, 8 Cal. 3d at 500 (citing 1923 Cal. Stat. 412). The language in the 1923 amendment was virtually identical to the language that remains in the TAA to this day. *Id.*

The PEAL was incorporated into the California Labor Code when it was enacted in 1937 and another category of employment agency – the "motion picture employment agency" was added. *Id. at 501*; CAL. ENTERTAINMENT COMM'N REP. at 7 (citing 1937 Cal. Stat. 230). The "artist manager" was added to the Employment Agencies Act (hereafter "EAA") in 1943 and then, in 1959, was separated from that Act into their own section. *Id* at 7 (citing 1959 Cal. Stat. 888).

The California Legislature repealed the EAA in 1967 but left the regulation of artist managers – the Artists' Manager Act – in the Labor Code. CAL. ENTERTAINMENT COMM'N REP. at 8. From 1943, when first added to the EAA, until 1978 when the law was renamed the TAA, "artist manager" was defined as:

> "A person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their careers and

> who procures, offers, promises or attempts to procure employment or engagements..." CAL. ENTERTAINMENT COMM'N REP. at 7, (quoting 1943 Cal. Stat. 1326)

When the Act was renamed in 1978, the term "artist manager" was removed and replaced with "talent agent," which was, and still is, defined as:

> "[a] person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment engagement for an artist or artists." CAL. ENTERTAINMENT COMM'N REP. at 8-9 (quoting Cal. Lab. Code § 1700.4)

The definition further states that a talent agent "may, in addition, counsel or direct artists in the development of their professional careers." Cal. Lab. Code §1700.4. These definitional changes placed the regulatory emphasis on the act of procuring employment, the domain of agents, and deemphasized the advisory functions typically performed by managers. [5]

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[5] As noted by the California Court of Appeal in *Waisbren*, "the primary function of the personal manager is that of advising, counseling, directing and coordinating the artist in the development of the artist's career.' The manager's task encompasses matters of both business and personal significance. As business advisors, they might attend to the artist's finances, and they routinely organize the economic

The legislature made several amendments to the Act in 1982 including creating several safe harbors. Specifically, and most relevant to the instant matter, the legislature added a safe-harbor provision for unlicensed individuals working "in conjunction with, and at the request of, a duly licensed and franchised talent agency *in the negotiation of an employment contract.*" CAL. LAB. CODE §1700.44 (emphasis added). These same amendments also removed the criminal penalties for violation of the Act and exempted procuring of recording contracts from its prohibitions. CAL. ENTERTAINMENT COMM'N REP at 9, 25. At the same time, the Legislature created the California Entertainment Commission (hereafter, the "Commission") to study the Act and, if applicable, to suggest changes. *Id* at 11.

2. The California Entertainment Commission Concluded that, for the Protection of Artists, Anyone who Procures Employment for Artists Should be Licensed and Subject to Regulation by the Labor Commissioner

The California Legislature created the California Entertainment Commission in 1982 to study the laws and practices of this and other states

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elements of the artist's personal and creative life necessary to bring the client's product to fruition..." *Waisbren*, quoting O'Brien, *Regulation of Attorneys Under California's Talent Agencies Act: a Tautological Approach to Protecting Artists* 80 Cal.L.Rev. 471, 481-483 (1982),fns. omitted. But a manager may not procure employment for an artist without first being licensed as an agent. *Waisbren* at 259.

relating to the regulation of artists' agents and representatives in the entertainment industry. *Waisbren,* 41 Cal. App. 4th at 256. The Commission was comprised of the Labor Commissioner, three talent agents, three personal managers, and three artists. CAL. ENTERTAINMENT COMM'N REP. at 1- 4. Its 1985 report to the Legislature and Governor formed the basis for the 1986 amendments to the TAA. *Waisbren*, 41 Cal. App. 4th at 258.

In its report, the Commission addressed six (6) principal issues, three (3) of which are especially relevant in the present case. Those three issues are:

> 1. Under what conditions or circumstances, if any, should a personal manager or anyone other than a licensed talent agent be allowed to procure, offer, promise, or attempt to procure employment or engagements... for an artist without being licensed as a talent agent? ...
>
> 3. Should the criminal sanctions of the Act ... be reinstated and, if so, in what form? ...
>
> 5. Should the entire Act be repealed and/or should there be a separate licensing law for personal managers? ..." CAL. ENTERTAINMENT COMM'N REP., at 12.

The Commission's response to the first and fifth issues were straightforward and clear – the Act regulates the procurement of employment and, for the protection of artists, anyone who procures

employment for an artist must be licensed. Specifically, the Commission concluded that "personal managers or anyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment for an artist without being licensed as a talent agent," other than as already permitted by the Act, no matter how incidental, occasional or infrequent. CAL. ENTERTAINMENT COMM'N REP. at 13, 19.

In addressing whether the criminal penalties should be reinstated into the Act, the Commission found them to be unnecessary because existing remedies were adequate. *Id.* at 26-27. Specifically, the Commission stated that "[p]erhaps the most effective weapon for assuring compliance with the Act is the power of the Labor Commissioner... to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare the contract void from the inception and order restitution to the artist of all fees paid by the artist and the forfeiture of all expenses advanced to the artist." *Id.* at 27.

In response to the fifth issue, the Commission concluded that there is no need to separately license personal managers because it is the act of procurement that must be regulated, not the individual person. The Commission reasoned that such a licensing scheme would be needlessly duplicative with the Act, stating that "[I]t is not, in fact, the person who is being licensed by the [Act]: rather, it is the activity of procuring employment." *Id.* at 31. In the words of the Commission, "one either is, or is not, licensed as a talent agent..." and

unlicensed individuals may not engage in acts of procurement. *Id.* at 31.

In summary, the Commission concluded that the Act proscribed any acts of procuring employment for an artist without a talent agency license – a view that was adopted by the *Waisbren* Court in its holding and has remained the prevailing law to date. *Waisbren*, 41 Cal. App. 4th at 259.

3. The Talent Agencies Act and the Unions' Franchise System Provide a Comprehensive Regulatory and Enforcement Scheme for the Representation of Artists in the Entertainment Industry

The TAA provides a comprehensive regulatory scheme for the licensing and oversight of talent agents by the Labor Commissioner.[6] Under the TAA, anyone who seeks to procure employment for an artist, whether or not he is successful in that regard and regardless of whether he calls himself an agent, must be licensed as a talent agency.[7] The Act is

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[6] Similarly, each of the Unions has its own regulatory scheme for the franchising of talent agents. The Unions' requirements are often parallel to the TAA's regulations and, in some instances provide for stricter scrutiny of and additional assurances from the applicant agent.

[7] The Act defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for ... artists..." CAL. LAB. CODE §1700.4. The Act defines "artists" to include a range of individuals in the entertainment industry, including actors, radio artists,

clear in that regard, as are the decades of administrative and judicial decisions interpreting it. *See, e.g., Buchwald*, 254 Cal. App. 2d 347 at 355 ("artists' managers (as defined by the Act), whether they be licensed or unlicensed, are bound and regulated by the Artists' Managers Act"); *Waisbren*, 41 Cal. App. 4th 246.

In addition to complying with the Act's requirements, each of the Unions requires that agents wishing to represent its members, and individuals working within the Union's jurisdiction, obtain a franchise from the Union.[8] The franchises set forth additional protections for each Union's members that expand upon and supplement those in the Act. These franchises establish standards of conduct for talent agents and require them to comply

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directors, writers, and "other artists and persons rendering professional services" in the entertainment industry. *Id.* The terms "talent agency", "talent agent", "agency," and "agent" as used herein are all intended to refer to a "talent agency" as defined in the Act.

[8] The Basic Contract between SAG and the ATA and NATR, which governed the formal relationship between them, expired on or about October 20, 2000. No amendment or extension has since been entered into, other than a fifteen (15) month period during which ATA and/or NATR-member agents maintained the status quo. Although SAG's membership rules include a complete prohibition of its members working with agents who are not franchised, SAG has temporarily stayed enforcement of this rule for those members who are represented by ATA and/or NATR-member agents pending further action. The formal relationship between AFTRA and the ATA and NATR remains in full effect.

with certain conditions and limitations that augment and supplement the provisions in the Act. [9]

Recognizing that talent agents may need periodic assistance, the TAA includes a "safe harbor" exception for unlicensed individuals. Specifically, it allows unlicensed individuals to work "in conjunction with, and at the request of, a licensed talent agency in the *negotiation of an employment contract.*" CAL. LAB. CODE §1700.44 (emphasis added). This is the sole exception for unlicensed individuals and nothing in the Act allows them to actually procure employment on an artist's, other than a recording artist's, behalf.

Consistent with its predecessor statutes, the TAA grants the Labor Commissioner exclusive original jurisdiction to hear disputes arising under the Act, subject to *de novo* appeal.[10] CAL. LAB. CODE § 1700.44 The Labor Commissioner has exclusive jurisdiction to determine whether claims fall within her jurisdiction and, having so determined, to adjudicate those claims. *Styne v. Stevens*, 26 Cal. 4th 42 (holding that when a case presents a colorable basis for exercise of the Labor Commissioner's jurisdiction, the Labor Commissioner has exclusive original jurisdiction). *See, also, Buchwald v. Katz*, 8 Cal. 3d 493; *Buchwald v. Superior Court*, 254 Cal App. 2d 347.

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[9] Each of the Unions requires that a talent agent seeking to represent its members have a valid license as a prerequisite to becoming franchised.

[10] *See infra.*

The Act includes many protections for artists that are not legally imposed on unlicensed individuals, including an express fiduciary duty and dispute resolution mechanism. Without the protections and remedies incorporated in the TAA and the Union franchises, vulnerable artists may find themselves without a remedy in instances of malfeasance.

II. There is No Conflict between the Federal Arbitration Act and the Talent Agencies Act Sufficient to Divest the Labor Commissioner of Original Jurisdiction

At the center of the instant dispute is whether an administrative proceeding under the TAA is pre-empted by the FAA. Petitioner relies largely on *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), in support of his position that the Federal Arbitration Act requires that a challenge to the validity of the contract be raised in arbitration, rather than before the administrative agency tasked with enforcing an applicable licensing scheme. While *Buckeye* does address a challenge to the validity of a contract based on a statutory violation, it does not address the situation where an administrative agency has been tasked with enforcing a regulatory statute.

The provision of the TAA at issue in the instant matter, Section 1700.44[11](hereafter, "Section

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[11] Section 1700.44 provides:

> "(a) In cases of controversy arising under this chapter, the parties involved shall refer the matters

1700.44"), grants the Labor Commissioner original jurisdiction to hear all disputes arising under the TAA. CAL. LAB. CODE §1700.44. The Labor Commissioner's determination is subject to appeal and *de novo* review. CAL. LAB. CODE §1700.44. While Section 1700.44 provides for appeal to the superior court, there is no prohibition on the parties then instituting arbitration proceedings pursuant to the terms of their contract.

A. The Administrative Remedy Set Forth in the TAA does not Stand as an Obstacle to Effecting the Purposes of Congress in Enacting the Federal Arbitration Act

Congress enacted the Federal Arbitration Act to overcome judicial resistance to arbitration. *Buckeye,* 546 U.S. at 443. It established a national policy favoring arbitration and placing arbitration agreements on an equal footing with other types of contracts. *Id.; Southland Corp. v. Keating,* 465 U.S. 1 (1984). Specifically, it provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such

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in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo...." CAL. LAB. CODE §1700.44

> contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2

The Court has held that the FAA is violated by state laws that declare arbitration provisions unenforceable. *See e.g. Southland,* 465 U.S. 1. (holding that a state law requiring judicial consideration of claims under the statute violated the FAA); *Perry v. Thomas*, 482 U.S.483 (1987) (a statute's requirement that litigants be provided a judicial forum for resolving wage disputes was in conflict with the FAA). But the Court has not directly addressed whether the FAA pre-empts a state regulatory statute that merely delays arbitration while a state administrative agency reviews an alleged violation of a statute it is tasked with administering.

1. Administrative Adjudication By The Labor Commissioner Does Not Bar Enforcement Of The Parties' Agreement To Arbitrate And Is Therefore Not In Conflict With The FAA.

The administrative review and adjudication required under the TAA, adjudication which is

subject to *de novo* review, does not invalidate the parties' arbitration agreement. At most, it simply delays resort to arbitration until the parties administrative remedies have been exhausted. Section 1700.44(a) specifically provides that the administrative adjudication by the Labor Commissioner is subject to appeal and *de novo* review. The appeal is, in essence, a new trial and not merely a review of the Labor Commissioner's decision. *Buchwald v. Katz*, 8 Cal. 3d 493, 502. As the California Supreme Court, interpreting an earlier, but nearly identical, version of Section 1700.44 points out:

> "A hearing *de novo* literally means a new hearing, or a hearing the second time... It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held. A hearing *de novo* therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held." *Buchwald* at 501 (quoting *Collier & Wallis, Ltd. v Astor,* 9 Cal.2d 202, 205(1937)).

Although the TAA provides that appeal from the Labor Commissioner's decision is to be brought in the superior court, nothing in the language of Section 1700.44(a) provides, nor even suggests, any intent to preclude resort, on *de novo* appeal, to arbitration. While Section 1700.44(a)'s language requires the appealing party bring its appeal in the superior

court, the parties may then freely enforce their agreement to arbitrate their claims, through application of either the California Arbitration Act, CAL. CODE. CIV. PROC. §§1281 *et seq.* or the FAA.

A statutory requirement, such as the one found in the TAA, that claims be brought initially before an administrative agency for nonbinding adjudication does not deprive the parties of their right to arbitrate. At most, it causes a brief delay in when the parties may initiate arbitration. As such, it does not run contrary to the FAA or the lines of cases interpreting it.

What must not be lost, in this matter, is that the arbitration was stayed *by the arbitrator*, irrespective of any proceedings in the superior court to stay arbitration. The parties freely exercised their right to arbitration but, recognizing the value of the proceedings before the Labor Commissioner, the arbitrator chose to defer to the administrative agency with specific expertise in the area of dispute.

2. The TAA Expressly Allows For Arbitration in Lieu of Administrative Remedies When the Arbitration Provision Complies With Standard Set Forth in the TAA

The TAA also expressly allows parties to provide that disputes be arbitrated in lieu of proceeding before the Labor Commissioner, provided certain conditions are met. Section 1700.45 provides that, notwithstanding Section 1700.44's requirement that disputes be referred to the Labor Commissioner, an provision in a contract requiring arbitration of

"any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid

> "(a) If the provision is contained in a contract between a talent agency and a person for whom the talent agency under the contract undertakes to endeavor to secure employment, or
>
> (b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency..." CAL. LAB. CODE § 1700.45

However, because the TAA is an exercise of the state's police power that the Labor Commissioner is charged with enforcing, to be effective, the arbitration provision must provide the Labor Commissioner notice of and an opportunity to be present at the hearings. Specifically, it provides that an arbitration provision, in addition to complying with either subsection (a) or (b), is valid:

> "(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and
>
> (d) If the contract provides that the Labor Commissioner or his or her authorized representative has the right to attend all arbitration hearings." CAL. LAB. CODE § 1700.45

The arbitration provision at issue in the instant matter did not comply with any of the requirements to be valid under Section 1700.45. Because it did not adequately comply with Section 1700.45, it was not adequate to bypass the Labor Commissioner's original jurisdiction to hear the dispute.

B. The TAA's Administrative Exhaustion Requirement is Consistent with Prior Cases Interpreting the FAA

The importance of the role played by administrative agencies in adjudicating disputes relating to the laws they are tasked with enforcing has long been recognized by the Court. The doctrine of exhaustion is well established in administrative jurisprudence and provides that a party may not seek its judicial remedies until its administrative remedies have been exhausted. *See e.g., McKart v. United States*, 395 U.S. 185, 193 (1969) (citing 3 K. Davis, Administrative Law Treatise § 20.01 et seq. (1958 ed., 1965 Supp.); L. Jaffe, Judicial Control of Administrative Action 424-458 (1965); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). In fact, just last year, the Court held that, in the context of prison litigation, that one must exhaust his administrative remedies prior to any resort to a judicial forum. *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) This principle should apply no less when a party seeks to resort to arbitration prior to exhausting the administrative process, especially when that administrative process acts only as a delay to arbitration and not a complete bar.

In *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2001), the Court recognized the importance of allowing an administrative agency to fulfill its statutory mandate, even where the parties had agreed to arbitrate their dispute. The Court stated that that the "policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." *Id.* at 294. The Court further went on to state that binding the E.E.O.C to the private arbitration agreement "would [have] undermine[d] the detailed enforcement scheme ... simply to give greater effect to an agreement between private parties that does not even contemplate the [agency's] statutory function." *Id.* at 296. These same principles are no less important when, as here, it is a state agency tasked with enforcing an important public policy.

This Court has also recognized that, while statutory claims may be arbitrated, just as those arising out of contract, "'not ... all controversies implicating statutory rights are suitable for arbitration.'" *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1075 (1999) (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627 (1985)). The California Supreme Court, recognizing the state's police power to protect its residents, has followed that line in holding that arbitration agreements cannot "serve as a waiver of [certain] statutory rights" when that waiver would be contrary to public policy. *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 100-101 (2000). The Labor Commissioner is tasked with protecting the public policy concerns underlying the

TAA and her jurisdiction to hear those matters, in the first instance, should not be diminished.

The Court has previously recognized that a state statute which acts merely as a delay to arbitration does not conflict with the FAA and may be enforced. Where the parties have incorporated state laws or remedies through their choice of forum, that choice should be upheld as long as they do not bar the arbitrator as the ultimate arbiter of the claim. As the Court has stated, "[t]he FAA's central purpose is to ensure 'that private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

In *Volt*, the Court addressed whether the FAA pre-empted a state statute that permitted a stay of arbitration pending the outcome of related litigation. *Volt*, 489 U.S. at 471. In upholding the arbitration-delaying statute, the Court reasoned that the purpose of the FAA was "'motivated... by a congressional desire to enforce agreements into which the parties had entered,'" *Id. at 478* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, at 220 (1985)), and to enforce them according to their terms. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967)). The Court in *Volt* refused to apply the FAA to pre-empt a state law that merely delayed arbitration even though the end result was that "arbitration [was] stayed where the [FAA] would otherwise permit it to go forward." *Id.* at 479.

The parties to the instant dispute specifically incorporated the laws of California into their contract and provided that the contract would be interpreted in accordance with those laws. As a result, the parties agreed to be bound by the provisions of the TAA, including the Labor Commissioner's jurisdiction. If Petitioner's actions violated that regulatory scheme such that he was acting as an unlicensed talent agent, as Respondent contended, the Labor Commissioner has exclusive original jurisdiction to hear the dispute in order to fulfill her statutory mandate to enforce the Act and the parties must first exhaust their administrative remedies. As in *Volt*, when that proceeding is concluded, and the parties' administrative remedies have been exhausted, the parties are free to proceed to arbitration.

C. The Labor Commissioner is Best Situated, in the First Instance, to Review Cases that Arise Under the TAA

The California Court of Appeal, in reaching its decision in this case, found that "it is appropriate for the Commissioner to resolve the dispute between the parties, for '[t]he Commissioner's expertise in applying the Act is particularly significant in cases where, as here, the essence of the parties' dispute is whether services performed were by a talent agency for an artist.'" *Ferrer v. Preston,* 145 Cal. App. 4th 440, 445 (2006) (*quoting Styne v. Stevens* 26 Cal.4th 42 at 58). The Court of Appeal added, "the Commissioner['s] ... interpretation of a statute he is charged with enforcing deserves substantial weight." *Id.* This Court has recognized that "since agency

decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *McKart*, 395 U.S. at 194

For three-quarters of a century, the Labor Commissioner has been charged with interpreting and applying the TAA and its predecessor statutes governing the procurement of employment in the entertainment industry. The Labor Commissioner's expertise in this area is extensive and well established through decades of administrative and judicial precedent. Based on that expertise, the Commissioner's interpretation of the statute as applied to the facts of a particular case may be of value, even upon *de novo* review. The Labor Commissioner's decision may also aid the parties in settling the case prior to review, whether in court or by arbitration, as they will have received an objective evaluation of the merits of their respective position.

In the instant matter, the arbitrator recognized the value of the Labor Commissioner's expertise when he granted a stay of the arbitration proceedings pending the outcome of the hearing before the Labor Commissioner. The arbitrator reasoned that a stay was appropriate, in part, "because the results of the Labor Commissioner hearing also could inform the Arbitrator as to the remedy or relief that would be just and equitable under the circumstances of this case." JOINT APPENDIX at 38.

In addition to the expertise the Labor Commissioner brings, the requirement that all

proceedings involving violations of the TAA be heard by her, or that she be given notice of and an opportunity to attend arbitrations, serves an added benefit to the public as a whole, even if it causes some delay to individual parties. This oversight ensures that the Labor Commissioner is aware of the nature and details of all claims arising out of the statute so she can most effectively enforce it. It also provides her relevant information to advise the Governor and Legislature of changes to the Act that may be necessary to serve its ultimate purpose of protecting artists in an industry rife with abuse. The minor inconvenience caused the parties by any delay is outweighed by the public policy interest in protecting a broader class of vulnerable individuals.

III. Reversal of the Decision Below Would Create a Potential Loophole to Enforcement of the Talent Agencies Act Against Unlicensed Individuals to the Detriment of Those it is Intended to Protect

The Petitioner asks the Court to open a potential loophole in the TAA that could prove disastrous to its enforcement and to the enforcement of the Unions' franchise systems – even to the point of potentially unraveling the entire regulatory scheme. As the TAA does not contain criminal provisions, the most effective deterrent to individuals crossing the line to unlawfully procure employment for artists has long been the risk that the Labor Commissioner would void a contract in its entirety when that line has been crossed. But, by inserting an arbitration provision in a representation contract, even where the representative is acting as an

unlicensed agent, much of the disincentive to violating the TAA may be eliminated.

Artists often find themselves in a position where they have little to no leverage to negotiate the terms of their representation agreements. They may not have the understanding or the negotiating clout to negotiate around an arbitration provision in the representation agreements they are presented. Few artists would comprehend that agreeing to such a provision might divest the administrative agency tasked with protecting them of jurisdiction over their claims in situations where an individual trusted to guide their career abuses that trust.

If the decision below is reversed, the likely consequence is a deterioration of the Labor Commissioner's ability to enforce the TAA against unlicensed individuals. Individuals seeking to avoid the TAA's licensing requirements could potentially do so simply by inserting an arbitration clause into their representation agreements. As the TAA does not contain criminal provisions or enforcement mechanism against unlicensed individuals other than individual claims, where there is an arbitration provision in an individual representation agreement, the Labor Commissioner is left with no way to enforce the act she is charged with enforcing.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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